



November 18, 2002

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2002-6558

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172305.

The Texas Youth Commission (the "commission") received requests for records pertaining to a specific child in the commission's care, including: 1) a copy of the victim impact statement and victim information sheet, 2) a copy of the child's individual case plan, 3) a copy of the youth rights specialist investigation report concerning case number 02-1249, 4) all restrictions, incident reports, behavior reports, and chronological records for the period January 2001 to October 2002, 5) a copy of Dr. Bartonico's November 17, 2000 assessment, and 6) a copy of the SASSI drug assessment. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You state that you will make available the documents relevant to item four. You raise no exception to item two, therefore, we presume you have released such information to the requestor. If you have not, you must do so at this time. *See Gov't Code* §§ 552.301, .302. We have considered the requestor's comments and the exceptions you claim and reviewed the submitted information.

We first address your arguments concerning the victim impact statement and victim information sheet. In addition to raising an argument for withholding the information under the Public Information Act, you ask us to defer our decision on the victim impact statement pending the outcome of a lawsuit concerning the openness of victim impact statements. We note that the openness of both victim impact statements and victim information sheets is the subject of *Hill v. Cornyn*, No. GN103262 (200th Dist. Ct., Travis County, Tex.). Accordingly, we observe that it is the policy of this office not to address issues that are being

considered in pending litigation. Thus, we will not issue a ruling as to this matter and will allow the trial court to resolve the issue of whether the victim impact statement and the victim information sheet must be released to the public.

We now turn to your argument concerning the investigation of case number 02-1249. You contend that this information is excepted from disclosure by section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of *crime* . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of *crime*.” (Emphasis added.) You tell us that the requested information relates to an investigation that is not yet complete. However, the investigation that is the subject of this request does not involve a crime. Therefore, you may not withhold the investigation report pursuant to section 552.108. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.—El Paso 1992, writ denied) (holding law enforcement exception applicable only to criminal investigation or prosecution).

However, section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the names of several juvenile offenders that must be withheld under section 552.101 and the doctrine of common-law privacy. *Cf.* Fam. Code § 58.007. We note, however, that the requestor states that she has a power of attorney on behalf of her child. Thus, the requestor has a special right of access to the specific child’s identifying information pursuant to section 552.023 of the Government Code.¹

Additionally, you contend that Dr. Bartonico’s November 17, 2000 assessment and the SASSI drug assessment are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 61.073 provides:

¹Because some of the submitted information is confidential with respect to the general public, if the commission receives a future request for this information from an individual other than the requestor, the commission should again seek a decision from this office.

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records are not public and are available only according to the provisions of Section 58.005, Family Code, and Chapter 61, Code of Criminal Procedure.

Section 58.005(a) of the Family Code provides that “[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment . . . of a child by [an agency] providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court” may only be disclosed to only certain individuals under certain circumstances. Some of the submitted documents consist of records of the examination and treatment of the individual at issue. In addition, Dr. Bartonico’s assessment, which you seek to withhold under section 61.073, consists of records of the psychiatric counseling and treatment of this individual.

We recognize that section 61.073 encompasses the submitted mental health records as records of examination and treatment in general. We note, however, that chapter 611 of the Health and Safety Code specifically addresses the public availability of mental health records. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general. *See Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). Accordingly, we will address the mental health records at issue under chapter 611 of the Health and Safety Code. Section 611.002 of the Health & Safety Code provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Under section 611.001, a “professional” is (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. A portion of the submitted information consists of records of the identity, diagnosis, evaluation, or treatment of a patient that are confidential with respect to the general public and may only be disclosed as provided under sections 611.004 and 611.0045 of the Health and Safety Code.

Section 611.0045 states in pertinent part:

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for the denial, and the duration of the denial.

....

(f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.

Section 611.004(a)(4) provides in turn:

(a) A professional may disclose confidential information only:

....

(4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs.

In this case, the records at issue relate to a patient who is the requestor's child. The Texas Supreme Court addressed a parent's right of access to mental health records in *Abrams v. Jones*, 35 S.W.3d 620 (Tex. 2000). In that case, the Texas Supreme Court held that "when a parent seeks a child's mental health records 'on the patient's behalf,' [as provided in section 611.0045(f)], the parent steps into the shoes of the patient." *Abrams*, 35 S.W.3d at 626. The court determined that section 611.0045(f) affords third parties, including a parent, no greater rights of access to mental health records than those of the patient. *Id.* Thus, the court held, because section 611.0045(b) can limit a patient's own rights to the patient's records, section 611.0045(b) can also limit a parent's right to a patient's records when the parent stands in the patient's stead. *Id.* In addition, the requestor has a power of attorney from the patient. We therefore address the patient's right of access to the records under section 611.0045(a) and (b).

Section 611.0045(a) gives a patient a right of access to the requested information, except as provided by other subsections of section 611.0045. *See* Open Records Decision No. 565 at 3 (1990) (upon written consent of subject, mental health records must be released). Section 611.0045(b) permits the professional to deny a patient access to any portion of that patient's mental health records if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. Section 611.0045(c) establishes the procedure that a professional must follow when denying access to the patient's records. The mental health records may be released only in accordance with sections 611.004 and 611.0045.

Next, we note that the remaining treatment records consist of records of examination and treatment that are not mental health records. We address these documents under section 61.073 of the Human Resources Code. As noted, section 61.073 requires that except as provided by section 61.093(c), records of examination and treatment of an individual in the custody of the commission are not public and are available only as provided in section 58.005 of the Family Code and chapter 61 of the Code of Criminal Procedure. We find that the requestor is not a party to whom the information at issue may be disclosed pursuant to section 58.005 of the Family Code. We further find that section 61.093(c) of the Human Resources Code and chapter 61 of the Code of Criminal Procedure do not apply in this instance. Accordingly, we determine that the commission must withhold the remaining treatment records under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code.

In summary, we decline to rule on the victim impact statement and victim information sheet. You may not withhold case number 02-1249 under section 552.108(a)(1), but you must withhold the names of juvenile offenders that we have marked under section 552.101. The mental health records may be released only in accordance with sections 611.004 and 611.0045 of the Health & Safety Code. The remaining treatment records must be withheld under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 172305

Enc: Submitted documents

c: Ms. Rhonda Taylor
9107 Woodgate Circle East
Waco, Texas 76712
(w/o enclosures)